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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 33-81:

MOUNTAIN VIEW AND PINE HILLS
EDUCATION ASSOCIATION, MEA,

Complainant,

- vs -

STATE OF MONTANA,
PERSONNEL DIVISION,

Defendant.

FINAL ORDER

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Linda Skaar on December 15, 1982.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Patricia J. Schaeffer, Counsel for the Personnel Division, Department of Administration, on January 7, 1983.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Linda Skaar as the Final Order of this Board.

DATED this 9th day of March, 1983.

BOARD OF PERSONNEL APPEALS

By Joan A. Uda
Joan A. Uda
Alternate Chairman

1 Bargaining began in mid-November. From the beginning
2 the bargaining was characterized as "hard-nosed". Although
3 bargaining was slow, concessions were made by both sides.
4 Difficulties were encountered and mediation was requested
5 after the third session. An initial mediation session was
6 held on February 2, 1981. At this session the state offered
7 the teachers a pay matrix which was eventually incorporated
8 into HB 840 and the subsequent executive order issued by the
9 Governor (Ex. Order 7-81).

10 On February 12, 1982, the parties jointly requested
11 fact finding. They stipulated that the fact finder was to
12 "make a single finding only that shall be either that the
13 MEA's wage demand or the state's wage offer is the more fair
14 and reasonable...". On April 3, 1981 the fact finder
15 issued his finding that the state's offer was the more fair
16 and reasonable.

17 2. During the period of time from February to April a
18 legislative committee was considering HB 840 which contained
19 the wage amounts the state Labor Relations Bureau had negoti-
20 ated with unions representing state employees. In addition,
21 it contained a pay matrix for the teachers at Mountain View
22 and Pine Hills schools. This pay matrix was based on the
23 state's last offer to these units. There was considerable
24 controversy between the executive branch and the legislature
25 over the total amount of money needed to fund HB 840. The
26 legislature finally adjourned appropriating \$48 million and
27 allowing the Governor to distribute the money among state
28 employees as he saw fit. During the legislative session the
29 MEA testified before the legislative committee and lobbied
30 on behalf of the Mountain View and Pine Hills bargaining
31 units.
32

1 3. Pursuant to an amended HB 840, the Governor issued
2 Executive Order 7-81 on May 7, 1981. This executive order
3 contained a pay matrix for the teachers at Pine Hills and
4 Mountain View schools even though negotiations had not been
5 completed. The pay matrices in the Executive Order were the
6 same as those in the original HB 840. LeRoy Schramm, then
7 Bureau Chief of the State Labor Relations Bureau was involved
8 in "the drafting and drawing up of the Executive Order."

9 4. On May 12, 1981 the parties again met in bargaining
10 session. The teachers presented a new pay proposal computer
11 designed to meet the intent of the legislature in that it
12 provided for an increase of 12% in cost to the state. This
13 meeting lasted nine minutes and ended with the state rejecting
14 the teachers' proposal because, in Ms. Moffatt's words, "it
15 was unreasonable."

16 The two sides did not meet again until July 29. At
17 this meeting the state refused to vary its salary offer from
18 the matrix included in Executive Order 7-81. In doing so,
19 Ms. Moffatt asserted that salaries were set by executive
20 order. Sean Mathews testified to this effect and Tom Gooch,
21 reading from his notes, confirmed Mr. Mathews assertion.
22 Ms. Moffatt did not recall having made such a statement.

23 5. Ms. Moffatt testified that after the Governor
24 issued the executive order on May 7, she was unsure how much
25 authority she had at the bargaining table. However, she
26 testified the reason that she rejected the teacher pay
27 proposal was not because she did not have the authority to
28 accept it, but because it was unreasonable and/or in excess
29 of the allocation of funds to the department. She further
30 testified that had the teachers made a proposal she liked,
31 she would have, at that point, faced the problem of whether
32 she had the authority to vary the state's offer of the pay

1 matrix in the executive order. She believed that the state's
2 offer of the pay matrix in the executive order was a good,
3 fair reasonable offer.

4 DISCUSSION

5 The question to be answered in this case is whether the
6 State of Montana failed to bargain in good faith over salary
7 schedules for teachers at the Mountain View and Pine Hills
8 schools in the Department of Institutions. Did the State,
9 in fact, refuse to bargain wages and by this refusal violate
10 39-31-401(5) MCA?

11 "The duty to bargain in good faith is an 'obligation...
12 to participate actively in the deliberation so as to indicate
13 a present intention to find a basis for agreement,...' This
14 implied both 'an open mind and a sincere desire to reach an
15 agreement' as well as 'a sincere effort...to reach common
16 ground.' The presence or absence of intent 'must be discerned
17 from the record.' Except in the cases where the conduct
18 fails to meet the minimum obligation imposed by law or
19 constitutes an outright refusal to bargain, all the relevant
20 facts of a case are studied in determining whether the
21 employer or the union is bargaining in good or bad faith,
22 i.e., the 'totality of conduct' is the standard through
23 which the 'quality' of negotiations is tested."¹

24 A refusal to bargain a mandatory subject of bargaining
25 such as wages is generally considered a per se violation of
26 the Act.² Common sense precludes taking the time and space
27 in a long discussion of the fact that wages (salary schedules
28 in this case) are a mandatory subject of bargaining. Wages
29 are set forth in 39-31-305 MCA as a subject upon which the
30 employer must bargain.

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¹ The Developing Labor Law, Bureau of National Affairs, 1971,
p. 278 (cites omitted).

² NLRB v. Katz, 369 US 736, 50 LRRM 2177 (1962).

1 The facts in this case are subject to analysis either
2 under the per se violation standard or under the good faith/bad
3 faith bargaining/totality of conduct standard. In evaluating
4 totality of conduct and making a determination of good or
5 bad faith the NLRB and the courts evaluate the entire course
6 of the parties bargaining conduct rather than a single
7 element. In upholding the NLRB finding of bad faith because
8 of the employer's total conduct, the Court of Appeals said,

9 "Certain specific conduct, such as the Company's unila-
10 teral changing of working conditions during bargaining,
11 may constitute per se violations of the duty to bargain
12 in good faith since they in effect constitute a "refusal
13 to negotiate in fact", NLRB v. Katz [cite omitted].
14 Absent such evidence, however, the determination of
15 intent must be founded upon the party's overall conduct
16 and on the totality of the circumstances, as disting-
17 uished from the individual pieces forming part of the
18 mosaic. NLRB v. General Electric [cite omitted].
19 Specific conduct, while it may not, standing alone
20 amount to a per se failure to bargain in good faith,
21 may when considered with all other evidence, support an
22 inference of bad faith."³

23 In early negotiation sessions the state and the teachers
24 engaged in hard bargaining over wages and other subjects.
25 During the third session bargaining became more difficult
26 and mediation was requested. At the mediation session held
27 in early February the state's negotiator made an offer of a
28 pay matrix which the Labor Relations Bureau later incorpor-
29 ated into a bill introduced to the legislature (HB 840).
30 After the legislature adjourned without adopting a pay
31 matrix the Chief of the Labor Relations Bureau helped draft
32 an executive order which imposed the very same matrix on the
bargaining teachers. In bargaining sessions held after the
executive order was issued the state's negotiator stated that
wages were set by the executive order. The state appears to
have determined the pay matrix it wished the teachers to

³ Continental Insurance Co. vs. NLRB, 495 F.2d 64, 86 LRRM 2003,
CA 2, 1974, enF. 204 NLRB 1013, 83 LRRM 1406 (1973).

1 have and unilaterally imposed it on the teachers who were
2 attempting to bargain.

3 In defense of its action the state argues that good faith
4 does not require fruitless marathon discussions at the expense
5 of frank statement and support of one's position,⁴ that the
6 employer does not have to listen to argument endlessly if
7 his insistence on a bargaining position is sincerely and
8 genuinely held.⁵ However, in this case the facts do not
9 show endless marathon sessions. On February 2 the state
10 made its initial offer of the pay matrix eventually adopted.
11 The executive order containing this matrix was drafted and
12 adopted before another bargaining session was held. It is
13 true that fact finding intervened and the legislative session
14 concluded in the interim but the parties did not return to
15 the bargaining table until after the executive order was
16 issued by the Governor. Clearly, the parties were not
17 involved in endless marathon discussions nor were they at
18 impasse. At the bargaining session held just five days
19 after the executive order was issued the teachers presented
20 a substantially different pay matrix -- one which they
21 believed would meet the state's criteria. This meeting
22 lasted only nine minutes and ended with the state's
23 negotiator rejecting the teacher proposal because it was
24 unreasonable. In nine minutes it may be possible to deter-
25 mine whether a simple across the board hourly wage demand is
26 unreasonable but it is hard to believe that anyone could
27 analyze the complexities of a teacher pay matrix in such a
28 period determining reasonableness or unreasonableness. The
29 fact that the state's negotiator believed that the pay
30 matrix was established by the Governor's executive order
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32 ⁴ NLRB v. American Insurance Co., (1952), 343 U.S. 395, 50 LRM 2147.

⁵ Philip Carey Mfg. Co. (NLRB 1963), 52 LRM 1185; enf. in part 331
F 2d 720, cert. denied 379 U.S. 888.

1 seems a more likely explanation of why the teacher offer was
2 rejected out of hand.

3 Lack of authority on the part of the management negoti-
4 ator is not considered a per se violation.⁶ In this case,
5 the state negotiator's questionable authority combined with
6 the facts surrounding the unilateral imposition of the
7 matrix on the teachers leads to the conclusion that the
8 State of Montana bargained in bad faith with the teachers at
9 Pine Hills and Mountain View schools.


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12 CONCLUSION OF LAW

13 The State of Montana, Personnel Division has bargained
14 in bad faith with the Pine Hills and Mountain View units of
15 the Montana Education Association and are in violation of
16 39-31-401(5) and by doing so are in violation of 39-31-401(1).

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18 RECOMMENDED ORDER

19 Cease and desist the unilateral imposition of wages on
20 members of bargaining units protected by the Montana Collective
21 Bargaining Act for Public Employees.

22 Dated this 15th day of December, 1982.

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25 
26 Linda Skaar
Hearing Examiner

27 NOTICE

28 This Recommended Order will become the Final Order of
29 the Board unless written exceptions are filed within 20 days
30 after service of the Recommended Order.

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32 ⁶ Fry Roofing Co. v. NLRB, CA 9, (1954), 35 LRHM 2009